

gratis.

1. May. 1690.

An Account of the Original of Judging according to Equity, and how Erroneous Judgments in Equity have been Rectified, Against Jurisdiction of Lords, Humbly Represented to the King, Lords and Commons; in Parliament Assembled. In Order to a due Establishment.

NOne but the King, and such as are delegated by him, can or ought to Judge in any Temporal matter. Such as sought relief in former times in Cases of Equity were Suitors to the King himself, who being assisted with his Chancellor and Council, did mitigate the severity of the Law in his own Person.

Afterwards the King being willing to ease himself of that trouble, by delivery of his Great Seal to his Chancellor, he delegated to him or the Keeper of the Great Seal, his own Regal and Extraordinary Preheminence of Jurisdiction, in Civil Causes; for mitigating the Rigour and supplying the defects of the Common Law, when extraordinary Circumstances required it, but this was very sparingly made use of by the Chancellor and Keeper in former times, and men were oftentimes relieved in Cases of Equity, as Brooke says, by Act of Parliament, whereof you may find Presidents in the Parliament Rolls hereafter mentioned, viz. 5 R. 2. n. 62. 3 H. 5. n. 17. 3 H. 5. n. 44. 9 H. 5. n. 12. 37 H. 8. n. 26.

If the Chancellor Err'd formerly his Decrees were reviewed, not before himself alone, but some of the Judges sat with him, most times in the Exchequer Chamber, as appears by the Year Books and Reports following, viz. 37 H. 6. f. 13. *ibidem* 35, & 36. 7 E. 4. f. 15. 23 E. 4. 67. 27 H. 8. f. 15.

But whether the Chancellor in the Cases last mentioned did take the Judges to his Assistance of his own accord, or by the Kings Order it appears not by the Books, but it appears that of later times the Decrees of the Chancellor were Reviewed by Judges and others by Order and Commission from the King, as appears by the Authorities following, viz. 4 Infr. f. 85. where you may find, that Sir *Moyls Finch* Petitioned Queen *Elizabeth* against a Decree in Chancery in the 42. and 43. years of her Reign, and she refer'd the matter to all the Judges of England, and upon their Opinions, being Certified into the Chancery, the Decree was Revers'd, and there the Lord Chief Justice Cokes Cites 4 Cases more that about that time were referred out of the Chancery to some of the Judges.

There be also several Orders entered in the Register's Books of Orders in Chancery, that appear to be made by virtue of the Kings reference from Chancery Decrees to the Judges, as follows, viz. 21. *Fumil & Fox*. 1. Inter *Chamberlain & Bubb*, 24. No. 3. Cor. 1. Inter *Barber & Unwin*, 12. No. 7. Cor. 1. Inter *Penington & Hildon*, 15. Cor. 1. Rot. passim 23. n. 5. indorf. a Commission to Review a Decree in Chancery between *Harvey and Langham* is there Inrol'd.

Of late Years we find that Erroneous Decrees in Chancery and other Courts of Equity were review'd by Appeals to the Lords in Parliament, and it is worth while to see how and when that Course first began.

In the Year 1621. Sir *John Bowcher* prefer'd a Petition to the Lords Intitled thus, *To the Right Honourable the Lords Spiritual and Temporal in Parliament Assembled.*

In that Petition he complains against the Lord Keeper for an over hasty determining of his Cause, and refusing to hear his Evidence, whereby, as he alledge'd, he had not Justice done him, and the Petition concludes in these words. *The Petitioner doth therefore in all Humility Appeal to your Lordships, &c. Humbly desiring that your Lordships would be pleased to hear and Judge the same.*

Upon Reading of which Petition it was refer'd to the Committee of Priviledges to consider whether it were a formal Appeal or not.

Afterwards the Lord Arch Bishop of *Canterbury*, the first of the Committee of Priviledges Reported to the House, that divers Lords of their Subcommittee appointed to search for Presidents, had made Report to them, that they could not find that the word Appeal was usual in any Petition, and that the Ancient and Accustomed form of Petitions brought to that House were, *To the King and his Great Council*. However they thought fit the matter of the complaint should be heard, which was accordingly done, as to the charge against the Lord Keeper for his over hasty hearing the Cause and refusing to hear the Evidence, but as to the merits of the Cause it was not heard; although Sir *John Bowcher* earnestly begg'd it.

In 1624. I find several Petitions of Appeals from Chancery to the Lords in Parliament, one whereof was a Petition of one *William Matthews* against a Decree obtain'd by *George Matthews*, and upon hearing, their Lordships revers'd the Decree; whereupon *George Matthews* Petitioned their Lordships in nature of a Plea to their Jurisdiction, setting forth, that he was inform'd by his Council, that it had been the course of that Honourable House to Reverse Decrees, but by Bill Legally Exhibited; and upon consideration had of that Petition their Lordships waved their own reversal, and directed that the Lord Keeper should become an humble Suitor to the King for a Commission to review that Decree.

And all the other Appeals in that Parliament that I could find were Refer'd back to the Chancery or to Arbitrators to endeavour to end, and none determin'd by the Lords as I could find.

From that time to the beginning of the Wars, about 1640, and 1641, I find nothing of Appeals to the Lords in Parliament, but in these troublesome times they were again receiv'd, but how Legally is not for me to determine, but this I will say, that before their Lordships can Examine Errors in Judgments at Law, there must be the King's leave for a Writ of Error for that purpose, and the Writs of Error are their Lordships Commissions; but I know none they have to determine Appeals from the Chancery no more then from the Prerogative Court, which they pretend not to be, have dishonor'd it.

The

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I find that the Lords were formerly Judges in Parliament in particular Cases, by the Kings Assent as appears, 4 E. 3. n. 1. and in the same Year n. 6. it was Assented and Agreed by the King and all the great Men in full Parliament, that the Peers of the Realm should not be driven for the future to give Judgment on any other but their Peers, nor have power so to do for the future, and n. 16, and 17, of that Parliament *Thomas of Berkleys*, Rnt. was tryed before the King in Parliament by a Jury of 12 Knights and acquitted: and 24 E. 3. n. 10. the Record of the Judgment against *Sr William Thorpe* was brought into Parliament, as the Record says, before the King himself who took the Advice of all the Lords, but I think the Judgment was the Kings and not the Lords.

1 H. 4. n. 79. It is declared by the Arch Bishop of *Canterbury*, by the Kings Command, that all Judgments appertain'd to the King and Lords unless in Statutes, &c. but I cannot find how the Lords in Parliament came to be Judges there in any Cause between Party and Party, without the King, or without his Assent, or the Assent of his Chancellor, or one whom the King puts there to Execute the Office of the Chancellor, who is the Kings Representative in the House of Lords in his absence, as appears 10 R. 2. n. 6. and by the several Actions by him done by the Kings Authority, as Proroguing and Dissolving the Parliament, so that the Chancellor or he that executes his place in the House of Lords by the Kings Commission is not barely a Speaker of the House of Lords and no more, and to be wholly Rul'd and Govern'd by the Lords, but he is Answerable to God & the King for all Judgments there given, as being intrusted to represent the King who is the supreme Judge.

Hollis's Case
stated, f. 22:

In Judgments heretofore in Parliament, the Advice of the Judges was followed, and the late Lord *Hollis*, the Champion for the Jurisdiction of the Lords in matters of Appeals, to justify the reasonableness of that Jurisdiction says, That the great Officers of the Kingdom are part of that Body, who in all reason, says he, should be knowing Men; the Chancellor of England is always their Speaker, who is commonly a person skilled in the Law, and says he further, they have all the Judges of the Land to be their Assistants, with whom they Advice, and by whose Advice they are guided in difficult points, and I think all points in Law are difficult to Men not skill'd in the Law, and there he Cites *Flouder's Case*, 1 H. 7. where the proceedings upon Writs of Error in the House of Lords are shewed, and there it is said, *Senescallus cum dominibus Spiritualibus & temporalibus per Concilium Justiciariorum procedant ad Errorum Corrigendum.*

Jenkins Lex
Terre, f. 55.

The King is sworn to Judge justly, and so is the Chancellor oblig'd to take the Oath of a Chancellor tho' he be a Peer, and though the Lords upon Tryal of a Peer give their verdict upon honour, yet I do not think that any Reason why, if they are made Judges in other Cases, they should not take the Oath of a Judge.

Cook, 1. Inf.
f. 110.

The King Judges by his sworn Judges who are his Council in matters of Law, and they are call'd to the House of Lords not at their Lordships pleasure, but they are call'd thither by the King's Writ which tells us to what end they come there in these words, *Quod interfuit nobiscum & cum ceteris de Concilio nostro super premissis tractaturi, vestrumq; Concilium Impensuri.*

Amongst the Petitions of the Commons in Parliament 1 R. 2. n. 87. it was prayed that no Suit between party and party be determined before any Lords or others of the Council, but before the Justices only which was granted by the King.

I think this was an Act of Parliament according to the manner of Enacting in those times, and that the Lords in Parliament are the Kings Council, and are often call'd his Great Council.

The Judges in a course of meer Law are oblig'd to Judge according to Law, and in a Course of Equity according to Equity; but in both Cases the matter of fact whereupon both Law and Equity doth arise ought by the Law of the Land to be tryed by Jury of 12 Men, unless in some few Cases, yet the Courts of Equity have determin'd matter of fact without Jury, which is very inconvenient.

It is objected by those that would not have the Judges Opinions regarded at all in Judgments in the House of Lords, that they may be corrupted, which I admit; but if any such thing appear, such Judges may be displac'd and honest Men put in their places, as sometimes Parliaments are factions, but that doth not justify the King to make Acts without Parliaments, yet he may dissolve a Faction Parliament and call another by whose consent he may make Acts, and so corrupt Judges being displac'd, the King and Lords may be advis'd by honest ones.

It may therefore be worthy consideration whether it be *secundum Legem & Consuetudinem Parliamenti* for the Lords to Reflect the Opinion of the Judges (as of late hath been done) both in matters of Law upon Writs of error, and in matters of Equity upon Appeals in which last, such Regard ought to be had to the Law as not quite to overthrow it, though by reason of some Circumstances in some Cases the Rigour of the Law may be moderated, and some small defects of the letter of the Law supply'd by Equity in Cases within the meaning thereof, and therefore he can never be a good Judge of Equity that is not well Skill'd in the Law: and if it were otherwise, since Equity overrules the Law, we had better take Advice of Honest Gentlemen that spent all their Lives in Hunting and Hawking and other pleasure, and never convers'd with nor understood the Gibbrish of Law Terms, nor the noise of Westminster Hall, then to give any Eminent and well read Lawyer 5; or 10; or 20; Guineys for his Advice; for the Judgment of the first sort is most naturall and therefore most like to sit with the Judgment of the Lords if they neglect the Advice of the Judges. And to perpetuate Affliction, such Judgment must now be the last resort according to some Opinions, for so they would have the Judgment of the Lords, though the King nor his Representative be no party nor consenting thereto, and that if they Err it is not to be rectified by themselves nor by Act of Parliament, though our Law Books say, that Parliaments may Err and do Err oftentimes, and their Errors may be rectified in another Parliament, or another Session, as appears *Bra. Error* 68 *Crompton* f. 12. *L. Hollis's Case* stated, f. 66.

Cooks 4. Inf.
f. 44.

The whole Parliament of the 24 of R. 2. and the Authority thereby given was repealed for this principal Reason amongst others, because there was a Clause therein, that no person should attempt to revoke any Ordinance then made, which restraint says the Lord Chief Justice *Coke*, was against the Jurisdiction and power of Parliament, the Liberty of the Subject, and unreasonable: What then will be the Consequence? If a Judgment in the House of the Lords be perpetually final, be it ever so Erroneous, that it cannot be rectified by themselves nor by Act of Parliament, and pray what becomes of the Kings supremacy, if the last resort of all be in the Lords alone without the King.

I may boldly say there is nothing so great a grievance as the Male Administration of Justice, and therefore nothing more becoming the Commons of England in Parliament Assembled (who are the grand Inquest of the Nation) then to endeavour to preserve to the People the due course of Administration of Justice, and to endeavour to restrain all Usurpation upon our Laws and Liberties by whomsoever it be, by their open declaring and voting against it, and Addressing to the King, our Supreme Head and Governour, for a Regulation, and in particular, to desire His Majesty to grant Commissions to the Judges and some others of Ability and Integrity to Review Decrees in Courts of Equity as formerly was the practice, and as now is used, to Review Decrees in the Prerogative Court; and to desire the Lords in Judgments in their House to take and have due Regard to the Opinion of the sworn Judges, and that if at any time any thing should happen to be unreasonably done or advis'd by them, through oversight, misinformation or otherwise, or if a Case should happen against Reason for which no Relief may be had by the ordinary Course of Law or Equity, the same may be help'd by the whole Parliament consisting of King, Lords and Commons, in whom the Legislative Power Resides, and who, all together, are Superiour to the Lords alone in their Judicial Capacity, and may supply their Deficiency, as was lately done in the Case of *Roberts* against *Bedvil* and *Winn*, the said *Roberts* having been in Chancery a great while, endeavouring to set aside a Will, and from thence Appealed to the Lords but could not effect it but By Act of Parliament, which may be seen in the Parliament Rolls, 18 Car. 2. n. 9.

Vir bonus est Quis? Qui Consula Parrum qui Leges Jurasti servat.